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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

PANOTEX PIPE LINE COMPANY and
CAMERON CRUDE OIL CORPORATION,

Petitioners,

v.

PHILLIPS PETROLEUM COMPANY and
DIAMOND SHAMROCK CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION, STATUTES AND FEDERAL RULE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	10
I. The Proper Federal Standard For Passing on a Motion for Directed Verdict Under Rule 50(a) of the Federal Rules of Civil Procedure, Particularly in Antitrust Cases, Should be Settled by This Court	10
II. The Conflict in the Circuits Concerning the Need to Prove "Dangerous Probability" in Attempt to Monopolize Cases Should be Resolved	17
III. An Agreement Between an Integrated Oil Company and Its Pipeline Subsidiary to Build a Pipeline on an Uneconomic Basis for the Purpose and With the Probable Effect of Monopolizing the Relevant Market Cannot be Justified by the Oil Company's Alleged Need for Oil	21
CONCLUSION	28
APPENDIX A	
Panotex Pipe Line Co. et al. v. Phillips Petroleum Co. and Diamond Shamrock Corp.,___F.2d__ (5th Cir. 1972)	1a-24a
Constitution of the United States, Amendment 7; United States Code, Title 15, Sec. 1, 2, 15, 26; Rule 50, Federal Rules of Civil Procedure	25a-29a
Plaintiffs' Exhibit 118	31a

TABLE OF AUTHORITIES

Page

Cases:

Bernard Food Industries, Inc. v. Dietene Co., 415 F.2d 1279 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970) 18

Berry v. United States, 312 U.S. 450 (1941) 15

Boeing Company v. Shipman, 411 F.2d 365 (5th Cir. 1969) *(en banc)* 13-14, 17

Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969) 18, 19

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 13

Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961). 16

Hanson v. Ford Motor Co., 278 F.2d 586 (8th Cir. 1960) 16

Hiland Diary, Inc. v. Kroger Co., 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969) 18

Lavender v. Kurn, 327 U.S. 645 (1946) 14, 17

Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) 18, 20

Lohr v. Tittle, 275 F.2d 662 (10th Cir. 1960) 16

Mackey v. Sears, Roebuck & Co., 237 F.2d 869 (7th Cir. 1956) 18

McElhenny Co. v. Western Auto Supply Co., 269 F.2d 332 (4th Cir. 1959) 18

Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969) 14

Page

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 21

Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962) 14

Simpson v. Skelly Oil Co., 371 F.2d 563 (8th Cir. 1967) 16

Smith v. United States, 337 F.2d 237 (9th Cir. 1964) 16

Standard Oil Co. v. United States, 221 U.S. 1, (1911) 17

Stief v. J.A. Sexauer Mf'g. Co., 380 F.2d 453 (2d Cir.) *cert. denied*, 389 U.S. 897 (1967) 16

Union Leader Corp. v. Newspapers of New England, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961) 24

United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) 24

United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961) 18

United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), aff'd 347 U.S. 521 (1954) 24

Wilkerson v. McCarthy, 336 U.S. 53 (1949) 15

Weir v. Chicago Plastering Institute, 272 F.2d 883 (7th Cir. 1959) 16

Woods Exploration & Producing Co., et al. v. Aluminum Company of America, et al., 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, __U.S.__ (1972) 18-19

United States Constitution:

Seventh Amendment 3

Statutes:

15 U.S.C. :

Sec. 1 3

Sec. 2 . . . . . 3, 18, 19, 20, 26

Page

Sec. 15 3

Sec. 26 3

Federal Rules of Civil Procedure:

Rule 50(a) . . . . . *passim*

Miscellaneous:

2B, Barron & Holtzoff, *Federal Practice & Procedure* §1075 16

Bagalay, *Directed Verdicts and Right to Trial by Jury in Federal Courts*, 42 Tex. L.Rev. 1053 (1969) 17

Blecher, *Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market,"* 38 Geo. Wash. L.Rev. 215 (1969) 19

Cooper, *Directions for Directed Verdicts: Compass for Federal Courts*, 55 Minn. L.Rev. 903 (1971) 17

Hibner, *Attempts to Monopolize: A Concept in Search of Analysis*, 34 A.B.A. Antitrust Law Journal 165 (1967) . . . 19

Johnston, *Monopolize or Attempt to Monopolize*, 3 A.B.A. Section of Antitrust Law 72 (1953) 19

McBain, *Trial Practice: Directed Verdicts: Federal Rule*, 31 California L.Rev. 454 (1948) 17

Memorandum for the United States as *Amicus Curiae* in *Hiland Dairy, Inc. v. Kroger Co.* in this Court (Oct. Term, 1968, No. 986), at p. 10-12 19

Multiple Sufficiency Tests in Federal Courts: The Scope of Lavender, 1970, Utah L.Rev. 155 17

Report of the Antitrust Subcommittee, Committee on the Judiciary, pursuant to H.R. 27, 86th Cong., 1st Sess., "Consent Decree Program-Department of Justice," p. 62 (1959) 22

Page

Scott and Rockefeller, *Antitrust and Trade Regulation Today:* 1967, at pp. 1-3 19

Turner, *Antitrust Policy and the Cellophane Case,* 70 Harv.L.Rev. 281 (1956) 19

Wright, *Law of Federal Courts,* (2d ed. 1970) at pp. 425-427.15, 16

9, Wright & Miller, *Federal Practice and Procedure:* Civil § 2526 16-17

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on February 17, 1972.

OPINION BELOW

The opinion of the court below is not yet officially reported and is set forth in the Appendix to this petition, pp. 12a-24a (hereafter referred to as "App.").

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding in a private antitrust suit that directed verdicts (which were denied at the close of plaintiffs' case) could subsequently be granted at a random point during the presentation of defendants' cases in chief by considering and weighing evidence introduced therein that did not support the plaintiffs' case, where such actions are not supported by 50(a) F.R. Civ. P., or any decisions relating thereto, and do not accord with prior decisions of this Court respecting the proper test to be applied in determining the sufficiency of evidence in passing on motions for directed verdicts.[1]

2. Whether the court below erred in holding that, in order to establish an attempt to monopolize by each defendant, plaintiffs were required to show that there was a "dangerous probability" that such defendant would succeed in achieving a monopoly.

3. Whether an agreement between a large integrated oil company and its pipeline subsidiary, by which the latter is to extend its pipeline on an uneconomic basis for the purpose of securing for itself a monopoly and of excluding a small pipeline from the market, is justifiable on the ground that the parent oil company "need[s] the oil for its refinery."

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[1] Involved herein is the question whether the court below ruled improperly in holding that evidence of conversations between high ranking officials of the two defendant oil companies relating to the prices each would charge and to territories each would enter did not constitute substantial probative evidence of a Sherman Act violation; and whether the court of appeals improperly failed to consider evidence erroneously excluded by the trial court, a part of which evidence the appellate court ruled to be admissible. (Statement of the Case, pp. 9-10, Reasons for Granting the Writ, pp. 12-13, *infra*).

CONSTITUTIONAL PROVISION, STATUTES AND FEDERAL RULE INVOLVED

1. Constitution of the United States:

   Amendment 7, printed at App., p. 25a.

2. United States Code:

   Section 1 of the Sherman Act, 15 U.S.C. §1, printed at App., pp. 25a, 26a.

   Section 2 of the Sherman Act, 15 U.S.C. §2, printed at App., p. 26a.

   Section 4 of the Clayton Act, 15 U.S.C. §15, printed at App., p. 26a.

   Section 16 of the Clayton Act, 15 U.S.C. §26, printed at App., p. 27a.

3. Federal Rules of Civil Procedure
   Rule 50, printed at App., pp. 27a-29a.

STATEMENT OF THE CASE

Petitioners, Cameron Crude Oil Corporation and Panotex Pipe Line Company (hereinafter sometimes referred to as "Cameron-Panotex"), filed suit against Phillips Petroleum Company ("Phillips") and Shamrock Oil and Gas Corporation ("Shamrock"), seeking injunctive relief and treble damages under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) and Sections 4 and 16 of the Clayton Act (15 U.S.C. §§15, 26). The defendants and others were charged with having combined and conspired to restrain and to monopolize interstate trade and commerce in the purchase and transportation of crude oil and with having attempted to monopolize the said trade and commerce.[2] Phillips and

[2]See Instrument Number 32 ("Instr. No.") in the Appendix p. 17, before the court of appeals which has been forwarded to the clerk of this Court, referred to as "A". Diamond Shamrock Corporation was subsequently substituted for Shamrock.

Shamrock filed counterclaims which were severed on the final day of trial and are still pending.[3]

At the close of plaintiffs' case, Phillips and Shamrock each filed a motion for a directed verdict.[4] These were denied (A. 829-881). The trial proceeded, with both Phillips and Shamrock introducing evidence. However, during the course of the defendants' case, the court invited Shamrock to resubmit its motion for a directed verdict (A. 1145), which was granted (A. 1154-1155) despite the fact that the trial court had reserved to Cameron-Panotex the right to introduce evidence in rebuttal (A. 1141, 1146). Thereafter, Phillips' motion for a directed verdict was granted (A. 1193-1197).

This case arose out of the steps taken, beginning in 1963, by Cameron to construct a crude oil pipeline (Panotex) which would run from the Panhandle of Oklahoma down through Lipscomb and Hemphill counties in Texas, then back into Oklahoma to a point near Elk City (A. 115-116). Cameron is a small business concern primarily engaged in the purchase, transportation by truck and sale of crude oil. Its subsidiary Panotex is a common carrier crude oil pipeline company.

Defendant Phillips is a major integrated oil company which owns crude oil producing properties, refineries, raw material and petroleum products pipelines and owns and operates service stations (A. 806). One of Phillips' refineries is located at Borger, Texas. Phillips Pipe Line Company ("PPLC"), a wholly-owned subsidiary of Phillips (A. 348-349), was named as a co-conspirator in this proceeding.

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[3]These counterclaims alleged violations of the Sherman Act (Instr. Nos. 41, 58) (*e.g.* A.64), see also (A. 1155, 1196).

[4]Instr. Nos. 117 and 116 (A.75; 70).

Defendant Shamrock, like Phillips, is a large integrated oil company, engaged in oil production, refining and pipeline operations (A. 417-422). Shamrock owns a refinery at McKee, Texas, in the Panhandle field located northwest of Phillips' Borger refinery. Shamrock Pipe Line Corporation, a wholly-owned subsidiary of Shamrock, was named as a co-conspirator.

At the time in 1963-1964 that Cameron was arranging to finance and to construct its pipeline, Phillips and Shamrock had pipelines in the area of their Texas refineries but neither had extended its lines into the geographic areas into which Cameron proposed to construct its line (A. 721-730).

In June, 1964, operating officials of Phillips and its pipeline company feared that they would lose control of the oil in the Como, Elmwood and Buffalo fields in Beaver County of the Oklahoma Panhandle (included in "Area 2" in the relevant markets established in plaintiffs' case) and the Logan Field, also in Beaver County (included in market "Area 3"). Their concern was that "this oil will be lost to another pipeline" if the Phillips pipeline company did not extend into those fields. Phillips' Operating Committee recommended reductions of 7 cents in its gathering and transportation charges for the extension.[5] In addition to reducing these charges (thereby increasing the net amount paid to producers for oil), the Phillips representatives proposed that purchases be on an "open division order basis" rather than the ten-year basis (or 11.4 million barrels) previously required, for the reason that "another purchaser" (namely, Cameron) was "offering to purchase on open division order basis."[6] Phillips considered it was in its

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[5]Plaintiffs' Exhibit 16a, June 16, 1964 (A. 1233-1234).

[6]Plaintiffs' Exhibit 16b, June 16, 1964 (A. 1241).

"best interest to control a large percentage of the crude oil reserves serving its refineries. . . . Unless Phillips is able to purchase this crude on the basis outlined above, other purchasers may lay a line to the area and obtain control of the oil."[7] These proposals were rejected by the Phillips' Executive Committee[8] and the Pipe Line Company's Board of directors, clearly because the terms were considered uneconomic.[9]

However, almost immediately thereafter, on July 14, 1964, less than a week after Cameron-Panotex obtained a bank commitment (July 8, 1964) for their pipeline, the Operating Committees of both Phillips and PPLC revived the rejected proposals in the identical form in which they had been previously made.[10] Three days later, Phillips' Executive Committee reversed itself and approved the proposal,[11] obviously because in the brief interim Cameron had secured its financing. The possibility that Cameron-Panotex would build a pipeline in Phillips' "back yard" (A. 359-360, 499) had now become an immediate threat; Phillips and its pipeline company were determined, regardless of cost and basic economics, to prevent this from happening.

Phillips intensified its efforts to prevent Cameron-Panotex from entering or securing more than an insignificant portion of the market. Top Phillips officials determined overnight to waive the requirements set forth in the pipeline company's economic studies (A. 501-502), which were based on the premise that an economic

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[7] *Ibid.* at A. 1242.

[8] Plaintiffs' Exhibit 16c, June 19, 1964 (A. 1246).

[9] Plaintiffs' Exhibit 16d, July 8, 1964 (A. 1250-1251).

[10] Plaintiffs' Exhibit 16a (A. 1235-1236), and Plaintiffs' Exhibit 16b (A. 1243-1244).

[11] Plaintiffs' Exhibit 16c (A. 1247).

pipeline could be built only if it secured a high percentage of the oil in the fields. The decision was made to proceed full steam ahead no matter how few producers committed themselves to Phillips. A proposed waiting period before commencement of the line was abandoned, and a crash program was put into effect to build and put the line in operation within 30 days.[12] As aptly stated by the trial court in denying Phillips' and Shamrock's original motions for a directed verdict:

> There is testimony in the record of the fact that the economic benefits be hanged, we're just going to get this thing built (A. 845)

To achieve its objective, Phillips entered into a remarkable written pact with Phillips Pipe Line Company. On July 31, 1964, Phillips agreed to pay "*any* gathering tariff over and above 17.5 cents per barrel which Phillips Pipe Line Company may establish for the area in question after January 1, 1968," provided that it would not return an annual average rate on investment of more than "approximately 7 % on an I.C.C. accounting basis."[13] PPLC in return waived its minimum requirements on barrels of committed oil. Thus, Phillips agreed that, if its pipeline company would waive its economic requirements and keep down its gathering charges to 17.5 cents per barrel until January 1, 1968 (apparently because the oil company wanted a little over three years to drive Cameron-Panotex out of the market), then Phillips would not object thereafter to *any* tariff subject to the limitation on investment return.

Thus, the independence formerly exhibited by these two corporations in pursuing their own business objec-

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[12] Plaintiffs' Exhibit 56f3 (A. 1276).

[13] Plaintiffs' Exhibit 17q (A. 1252-1253).

tives at "arm's length"[14] was abandoned when they became one in intent and actions to exclude Cameron-Panotex.

Phillips and PPLC completed their crude oil gathering system by September 3, 1964 (A. 267), four months prior to the completion of the Cameron-Panotex line (A. 187).

In July, 1964, Shamrock determined to extend its line north from the Frass and Follett fields in Lipscomb County, Texas. Before doing so, the president of Shamrock conferred with a high official of Phillips on two subjects critical to the construction of the Shamrock line, price and pipeline territory. In the first conversation, Shamrock determined that Phillips proposed to charge oil producers from whom they purchased oil 15 cents a barrel to amortize the cost of the pipeline (a decision which affected directly the amount paid on oil purchases) and in this and a follow-up call from Phillips, Shamrock informed Phillips that it planned to go into the Logan area and ascertained that Phillips was also interested in Logan. Shamrock stressed that "we think that we need that crude oil as a future supply of crude oil for our refinery" (A. 428-429). After these conversations, Phillips stopped its pipeline short of Logan in Beaver County, Oklahoma, honoring Shamrock's professed need for the oil in that field. While Phillips extended offers to producers in Logan, these offers were considerably less attractive than Shamrock's and obviously would be unacceptable to the producers. Similarly, Shamrock, after learning in these conversations that Phillips was in fact planning to extend its line into Como, abandoned

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[14] Harry G. Fair, the P.P.L.C. president, testified that "we operate Phillips Pipe Line Company strictly at arm's length" and that "it [the pipeline company] is an entity unto itself" (A. 348-349).

whatever thoughts it may have had of entering that field, even though it would have been a much more substantial source of oil than the Logan field and Shamrock had previously expressed interest in going into Como. In August, 1964, Shamrock extended its line into the Bechtold and Logan fields (A. 443). (See Plaintiffs' Exhibit 118 reproduced in the Appendix to this Petition at p. 31a; the original of this exhibit has been forwarded to the Clerk of this Court.)

From July through November, 1964, Shamrock progressively increased the net-back price it was offering to producers in the Logan and Bechtold fields (A. 454-463) in an effort to deprive the Panotex pipeline of vitally needed oil.

Shamrock did not limit itself to its pricing weapon to restrain Cameron-Panotex. The testimony also reflects that Shamrock and Shamrock Pipe Line Corporation continued until September, 1968 (the cut-off date imposed by the trial court on evidence of acts by the defendants) to extend their pipeline and to set their prices in a manner calculated to prevent the growth of Cameron-Panotex—the Shamrock Oil Company setting the prices and the pipeline company installing the lines (*e.g.*, A. 434-435). Shamrock, like Phillips, abandoned net prices established on the basis of its analysis of the economic requirements to support the pipeline.

The evidence of Cameron-Panotex further was that, during the period from February, 1964, to June, 1964, when plaintiffs were seeking to obtain financing for their pipeline from the First City National Bank of Houston, the Houston bank, unknown to Cameron-Panotex, had been in communication with Phillips (A. 294). The trial court (improperly, petitioners assert) denied admission of evidence proffered by Cameron-Panotex consisting of correspondence running between its financial consultant [Kaye] and an official of the Houston bank [Gueymard]

and of memoranda prepared by Kaye contemporaneously with the negotiations reflecting that "Phillips positively does *not* want this line put in, that they are very mad about it–that they want the oil there";[15] that "Phillips decidedly does not want this pipeline which it considers is in its 'backyard'."[16] These actions, as well as other delays encountered by Cameron-Panotex as a result of defendants' activities, caused great financial loss to Cameron-Panotex as did the combined steps of Phillips and Shamrock to box in the independent pipeline and to impede its normal growth pattern.

REASONS FOR GRANTING THE WRIT

I

The Proper Federal Standard For Passing On A Motion For Directed Verdict Under Rule 50(a) Of The Federal Rules Of Civil Procedure, Particularly In Antitrust Cases, Should Be Settled By This Court.

The trial court denied Phillips' and Shamrock's motions for directed verdicts against Cameron-Panotex at the close of plaintiffs' case.[17] Thereafter, however, the court interrupted the presentation of evidence by the defendants at a completely random point and invited the renewal of those motions, and then granted directed verdicts in favor of Phillips and Shamrock.

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[15] Plaintiffs' Exhibit 56g19 (A. 1316).

[16] Plaintiffs' Exhibit 56g20 (A. 1317-18).

[17] The trial judge, after lengthy argument, stated his reasons for denying the motions for directed verdict: "If it were clear-cut where reasonable men could not differ, I wouldn't hesitate a minute to instruct a verdict. *I just think this one has some fact issues that must be submitted to the jury because I know reasonable jurors could differ*...." (A. 881) (Emphasis added.)

The evidence introduced by the defendants related primarily to attempting to justify their actions which, it was contended, were based upon the necessity for their respective refineries to acquire crude oil in the area in which plaintiffs were constructing an independent pipeline. Further, each defendant introduced evidence as to the nature and extent of purported past competition between the two defendants. This evidence, then, formed the basis for the court's granting a directed verdict which it had denied earlier in the previous state of the record. [18]

The court of appeals fully upheld such actions, although it paid token observance (Opn., App., p. 6a) to the principles of "orderly procedure in the frame of reference of trial court discretion, procedural due process, and a fair trial"[19]. While conceding that the granting of a directed verdict at a random point in the trial was unique, stating that "we have found no case in point one way or the other" (Opn., App., p. 6a), the court refused to pass on whether Rule 50(a) F.R. Civ. P., or any other principle prohibited such action, seeking to avoid the issue by analogizing the matter to the harmless error rule which exists under federal criminal procedure in the reservation of ruling on a defendant's

[18]The action of the trial judge was not a rethinking of his previous denials of directed verdicts based on the evidence as at the close of plaintiffs' case; instead, he specifically stated that his ruling encompassed the evidence presented by defendants. The trial judge announced to the jury that his rulings as to both defendants for a directed verdict were based on "the state of the evidence to this point in the trial" (A. 1197). The final order of the trial court stated that the court had based its directed verdicts on the "state of the record at the time the motions were granted", (Instr. No. 121, A. 87).

[19]This quotation from the court of appeals aptly summarizes petitioners' argument on this score, although of course petitioner believes the court below to be wrong in its resolution of the issue.

motion to acquit where the evidence is sufficient to sustain a conviction at the close of the Government's case (Opn., App., p. 7a). In order to do this, however, and in explicit contradiction of its analogy, the court of appeals resolved the case on the basis of evidence introduced by defendants, Phillips and Shamrock, and by drawing inferences from such evidence unfavorable to the non-moving parties, Cameron-Panotex.[20] In addi-

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[20] Thus, for example, the court accepted Phillips' and Shamrock's evidence presented through their expert witnesses (*e.g.*, A. 922-933, 937-940, 983, 1095-1097) that both companies needed the oil for their respective refineries and that the actions of the parent companies in concert with the subsidiary pipelines amounted to nothing more than a proper business motive under the circumstances, which arose out of a desire to protect their positions (Opn., App., pp. 19a, 20a, 21a). The Phillips-Shamrock telephone calls relating to pipeline routings and to pricing policies were determined to be completely innocent on the basis that the companies had been "competitors" in the past and the court determined that lack of ability to obtain commitments was the basis for Phillips' yielding the Logan area to Shamrock and for Shamrock avoiding the Como area (Opn., App., pp. 21a-22a) all based on the court's acceptance of defendants' evidence (*e.g.*, A. 1096-1104).

The court ignored plaintiffs' evidence and inferences flowing therefrom as, for example: Phillips and Phillips Pipe Line agreed to rush through to completion an uneconomic pipeline extension to block the Cameron-Panotex pipeline (A. 501-502; Plaintiffs' Exhibit 17q, A. 1252-1253). Both Phillips and Shamrock raised their offers to producers to deprive the Panotex pipeline of oil (A. 1239, 1242, 1244, 1216-1229, 1474-1475; A. 1233-1234, A. 457-463). Shamrock continued to extend its pipeline to block plaintiffs' line (*e.g.*, A. 434, 557, 561, 563, 566). Phillips and Shamrock, as noted *supra*, conferred on the subject of prices and the route in which each would extend its pipeline in the area of plaintiffs' proposed line (A. 428-429). Plaintiffs offered to sell or otherwise make available oil to both defendants (A. 147-149, 152-157). Plaintiffs offered to connect their pipeline to Sham-

tion, the court ignored much of the evidence favorable to plaintiffs and the inferences flowing therefrom. Such evidence as the court did consider was reviewed by "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each" rather than by looking " 'at the whole picture' " and " 'not merely at the individual figures in it.' " *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

The action of the trial judge, upheld by the court of appeals, thus not only raises the issue of the propriety of directing a verdict at such a point but also necessarily involves the application of the Fifth Circuit's standard for testing the sufficiency of the evidence on a motion for directed verdict, that standard, as set forth in *Boeing*

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rock's which in turn connected to Phillips' pipeline (A. 470). Five thousand barrels of oil per day were available in Como 6 to 8 miles from the Shamrock pipeline, yet after conferring with Phillips, Shamrock built the same distance to Logan where about 1600 barrels per day were available and 6 miles to Bechtold where only 500 to 600 barrels per day were available (A. 552-554, 1352, 1090). The financial prerequisites for a proposed pipeline operating on an independent basis demonstrated that there was room economically for only one line (A. 681, 685-687, 724-725, 729). The court ruled that Exhibit 152 was improperly excluded (Opn., App., p. 8a) but never considered it in respect to the document's description of how a major integrated oil company could and would use its pipeline as a "fighting ship." This exhibit also formed the basis for Shamrock's awareness of the necessity to avoid unapproved invasions of Phillips' "backyard" (A. 1324-1327). Phillips admitted that it had "built many pipe lines that were not economically feasible" (Rec. 544) and when Phillips sold crude that "nine times out of ten it would enable Phillips to put the equivalent desirable crude into our own refinery. . ." (A. 338). Both defendants sold large quantities of oil to each other and were joint owners of a products pipeline serving their refineries (Pls. Ex. 20c1-20c22, A. 571-573; A. 390).

Company v. Shipman, 411 F.2d 365, 374 (1969) (*en banc*), and applied below (Opn., App., p. 10a), being that:

> [T]he Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion.[21]

The present case affords this Court the unique opportunity to clarify an area of the law that has been the subject of widespread controversy, confusion and discussion and involves a problem that arises daily in federal jury trials throughout the nation. It is an area which courts and commentators have called to this Court to settle. The need for clarification is particularly great in antitrust cases which are often, as here, complex in nature, and where "summary procedures should be used sparingly" and "where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), a case decided by summary judgment. See also, *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969), where in dealing with an alleged antitrust conspiracy this Court

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[21] Judges Thornberry and Goldberg, concurring specially, interpreted the majority's "standard" to mean that "the court should consider the *evidence* and *inferences most favorable to the opposing party and the uncontradicted evidence put on by the movant*" and that "the court should grant the motion only if reasonable, fair-minded men could *reach no conclusion other than the one urged by the movant*." 411 F.2d at 405. (Emphasis added.) Judge Rives dissented, stating that "the standard" was in conflict with the teachings of this Court in Lavender v. Kurn, 327 U.S. 645, 653 (1946); 411 F.2d at 392.

spoke of the need for resolution of material issues of fact "by the jury after a plenary trial."

These unresolved questions relating to Rule 50(a) F.R. Civ. P. have been succinctly summarized by Professor Wright in the *Law of Federal Courts* (2d ed. 1970), pp. 425-426, as follows: (1) whether the court is to look only to the evidence favorable to the party against whom the motion is made or whether it is to consider all the evidence; (2) whether the pronouncements by this court in jury actions arising under the Federal Employers' Liability Act and the Jones Act represent a uniform standard which is controlling in all jury cases in the federal courts; (3) the proper technique in resolving all "legitimate inferences" that may be drawn from the evidence in the non-movant's favor.

Professor Wright states (p. 426) that this Court has "apparently" adopted the rule that only evidence favorable to the non-moving party may be considered, citing *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949) ("we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given") and *Berry v. United States*, 312 U.S. 450, 456 (1941) ("There was evidence from which a jury could reach the conclusion that petitioner was totally and permanently disabled. That was enough."), and citing at pp. 426-27 the many decisions of this Court to the same effect in Federal Employers' Liability Act and Jones Act cases. Professor Wright then says (p. 426):

> Despite these decisions from the Supreme Court, many lower courts continue to follow the older practice.

And he cites for this proposition decisions from various courts of appeals, including the Fifth Circuit's

decision in *Boeing Co. v. Shipman, supra.*[22] Cases to the contrary from other courts of appeals are cited.[23] Thus, we have not only an apparent refusal to follow the guiding principles laid down by this Court but also a direct conflict in the circuits on this issue.

This matter has been in controversy for years, amid many calls upon this Court to clarify the question. Professor Wright says, referring to the FELA and Jones Act cases (p. 426):

> It is of much practical importance to know whether these decisions are confined to the particular statutory actions in which they have been handed down, or whether they represent a construction of the Seventh Amendment that is controlling in all jury cases in federal courts.

Professor Wright's statement exemplifies the continuing plea which has been made over the years to this Court to provide guidance to the lower federal courts regarding this question of most fundamental importance.[24]

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[22] Other cases cited are as follows: *Steif v. J.A. Sexauer Mf'g. Co.*, 380 F.2d 453 (2d Cir.) *cert. denied*, 389 U.S. 897 (1967); *Smith v. United States*, 337 F.2d 237 (9th Cir. 1964); *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653 (1st Cir.), *cert. denied* 368 U.S. 931 (1961). These are but illustrative of the many cases within the circuits as is also true of the cases cited in the next footnote.

[23] These cases are as follows: *Lohr v. Tittle*, 275 F.2d 662 (10th Cir. 1960); *Weir v. Chicago Plastering Institute*, 272 F.2d 883 (7th Cir. 1959); *Simpson v. Skelly Oil Co.*, 371 F.2d 563 (8th Cir. 1967), cf. earlier decision of the same circuit, *Hanson v. Ford Motor Co.*, 278 F.2d 586 (8th Cir. 1960).

[24] 2B, Barron & Holtzoff, *Federal Practice & Procedure*, § 1075; 9, Wright & Miller, *Federal Practice and Procedure*: Civil

To summarize, the unique issue whether a trial court may direct a verdict at a random point during defendants' case after a motion for directed verdict at the end of plaintiffs' case has been denied, is here inextricably intertwined with the constantly recurring issue of the proper federal standard for testing the sufficiency of the evidence. Both issues arise under Rule 50(a) F.R. Civ. P., and both should be resolved by this Court.

II

The Conflict In The Circuits Concerning The Need To Prove "Dangerous Probability" In Attempt To Monopolize Cases Should Be Resolved.

This petition presents the important question, never directly determined by this Court, of whether in establishing the antitrust offense of attempt to monopolize in a private treble damage action the plaintiff must prove that there was a dangerous probability that the attempt would be successful. Here, the opportunity is afforded

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§ 2526; *Multiple Sufficiency Tests in Federal Courts: The Scope of Lavender*, 1970, Utah L.Rev., p. 155, specifically criticizing *Boeing v. Shipman* as failing to follow the standard set forth by this Court in *Lavender v. Kurn*, observing further that commentators have pointed to a series of per curiam reversals of circuit court decisions overturning jury verdicts for plaintiffs in non-FELA cases, citing Jaffe, *Judicial Review: Questions of Fact*, 69 Harv. L. Rev. 1020, 1043 & n. 85 (1956); Bagalay, *Directed Verdicts and Right to Trial by Jury in Federal Courts*, 42 Tex. L.Rev. 1053, 1064-1071 (1969); McBaine, *Trial Practice: Directed Verdicts: Federal Rule*, 31 California L.Rev. 454, 462-463 (1948). For a detailed review of this entire area, see Cooper, *Directions for Directed Verdicts: Compass for Federal Courts*, 55 Minn. L.Rev. 903 (1971).

for settlement of this issue in a case not decided at the pleading stage but one in which the merits were reached.

A primary basis upon which Cameron-Panotex filed their complaint and tried their case was that Phillips and Shamrock each violated Section 2 of the Sherman Act in attempting to monopolize the purchase and transportation of crude oil in the area in which it extended its pipeline in an effort to eliminate Panotex as a pipeline competitor. The court of appeals disposed of this charge by stating, in the case of Phillips, that "a dangerous probability of success is clearly lacking" (Opn., App., pp. 18a-19a) and, in the case of Shamrock, that "[t]he proof is clear that there was no dangerous probability of a monopoly" (Opn., App., p. 21a).

There is a direct conflict in the United States courts of appeals respecting the need to establish dangerous probability of success in attempt to monopolize cases.[25]

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[25]*Lessig v. Tidewater Oil Company*, 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), held that probability of actual monopolization is not an essential element of proof of attempt to monopolize; *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961) held that in a conspiracy to monopolize case there need not be proof of a dangerous probability that monopolization will result from such conspiracy. To the contrary are *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 974 (8th Cir. 1968), *cert. denied* 395 U.S. 961 (1969); *Mackey v. Sears, Roebuck & Co.*, 237 F.2d 869, 873 (7th Cir. 1956); *Bernard Food Industries, Inc. v. Dietene Co.*, 415 F.2d 1279, 1284 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); and *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 (5th Cir. 1969). See also *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332, 339 (4th Cir. 1959), finding a deficiency in failure to plead, *inter alia*, a "dangerous possibility" that a monopoly could be effectuated. Subsequent to the *Cliff Food* decision in the Fifth Circuit, that court, in *Woods Exploration & Producing Co., et al. v. Aluminum Company of America, et al.*, 438 F.2d 1286, 1304

It is the position of Cameron-Panotex that in the instant case the court below, in holding that proof of a dangerous probability of success was requisite to a verdict in plaintiffs' favor, applied an incorrect standard. The offense of attempt to monopolize under Section 2 is a separate offense from that of monopolization and should be defined in the light of Congress' purpose in the Sherman Act to reach all unreasonable restraints of trade (*Standard Oil Co. v. United States*, 221 U.S. 1, 61 (1911)):

> [T]he second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not

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(1971), *cert. denied*, ___ U.S. ___ (1972), noted that "cases have seemingly split as to whether a dangerous probability of monopolization is an essential element of proof" and did not "resolve this conflict over the requisites of conspiracies or attempts." Although *Woods* was decided in the Fifth Circuit subsequent to *Cliff Food*, that court of appeals made no reference to *Woods* in the instant case in accepting the Cliff Food ruling that proof of "dangerous probability" was essential. Discussions of the ingredients of the offense of attempt to monopolize in legal periodicals include Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281 (1956); Blecher, *Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market,"* 38 Geo. Wash. L.Rev. 215 (1969); Johnston, *Monopolize or Attempt to Monopolize*, 3 A.B.A. Section of Antitrust Law 72 (1953); Hibner, *Attempts to Monopolize: A Concept in Search of Analysis*, 34 A.B.A. Antitrust Law Journal 165 (1967); Scott and Rockefeller, *Antitrust and Trade Regulation Today: 1967*, at pp. 1-3. See also, *Memorandum for the United States* as *amicus curiae* in *Hiland Dairy, Inc. v. Kroger Co.* in this Court (Oct. Term, 1968, No. 986), at pp. 10-12.

> embraced within the general enumeration of the first section.

In keeping with this announced purpose of this Court that Section 2 seeks to "embrac[e] all attempts to reach the end prohibited by the first section [Section 1 of the Sherman Act]," the court of appeals in *Lessig v. Tidewater Oil Company, supra*, 327 F.2d at 474, said, in response to defendant's argument that plaintiff must prove "dangerous probability of success, i.e., that if unchecked monopolization will result":

> We reject the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. Of course, such a probability may be relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probability the statute requires--perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective.

For that reason, "[w]hen the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue'." *Lessig v. Tidewater Oil Company, supra* at 474.

The evidence makes it abundantly clear that the intent of each of the defendants was to exclude Cameron-Panotex from and to monopolize an appreciable segment of interstate purchase and transportation of crude oil, *e.g.*, the decision by Phillips and Phillips Pipe Line Company, when faced with the imminent construction of the Panotex line, to proceed with their pipeline extension on a basis–as the trial judge put it–"that the economic benefits be hanged, we're just going to get this thing built" (A. 845); the actions by both Phillips and Shamrock to pay increased amounts to producers to

prevent Cameron-Panotex from securing oil for its pipeline (A. 1239, 1242, 1244; 457, 463); the progressive extensions of its pipeline by Shamrock to hem in the Panotex line (557-566).

The conflict in the decisions of the circuit courts of appeals is one which should be resolved not only for this petitioner but for other private treble damage plaintiffs whose efforts to enter and to remain in business have been imperiled by similar conduct. Otherwise, "the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States" will be threatened. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 136 (1968).

III

An Agreement Between An Integrated Oil Company And Its Pipeline Subsidiary To Build A Pipeline On An Uneconomic Basis For The Purpose And With The Probable Effect Of Monopolizing The Relevant Market Cannot Be Justified By The Oil Company's Alleged Need For Oil.

A. Importance of Court's Ruling.

The court of appeals' ruling with respect to the manner in which an integrated oil company may use its separately-incorporated pipeline presents substantial questions under the antitrust laws not heretofore considered by this Court. In this case, the two oil companies, Phillips and Shamrock, when faced with the threat of competition by plaintiffs, each used its wholly-owned pipeline subsidiary as a tool to accomplish the purpose of the parent, with no regard for the independent existence or economic requirements of the separate pipeline corporation.

The importance of oil pipelines to the petroleum industry cannot be overestimated. In response to an inquiry at a Congressional hearing as to whether "it is not too much to claim–in fact, it has been the experience of the oil industry–that the control over transportation is the most effective method for controlling the oil industry in the United States," the then Assistant Attorney General in charge of the Antitrust Division replied, "Certainly one of the most effective."[26] Oil pipelines may be used to compel independent producers without means of transportation to sell their crude at the well to the oil company whose subsidiary operates the pipeline and may be used to deprive independent refinery operators of a source of crude. To accomplish these and other anticompetitive purposes, major oil companies, as here, use their pipeline subsidiaries as "fighting ships" to eliminate competition.[27]

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[26]Report of the Antitrust Subcommittee, Committee on the Judiciary, pursuant to H.R. 27, 86th Cong., 1st Sess., "Consent Decree Program-Department of Justice," p. 62 (1959).

[27]The manner in which a pipeline subsidiary can be used as a competitive tool was indicated by Plaintiffs' Exhibit 152 (wrongfully excluded from evidence by the trial court and held to be admissible by the court of appeals [Opn., App., p. 8a]) where an official of Phillips noted that "if the decision is made that we should raid Shamrock, this can only be accomplished by full cooperation on the part of the Pipe Line Company in that they will have to make pipe line connections to the leases immediately as they are raided" (A. 1325).

B. Agreement Between Phillips and Its Pipeline To Monopolize and Restrain Trade in the Relevant Market.[28]

There is substantial evidence in the record from which the jury reasonably could have found (1) that Phillips and PPLC acted for the purpose of achieving a monopoly in Area 2;[29] (2) that the pipeline was to be built on an uneconomic basis; and (3) that there was a dangerous probability that PPLC would achieve a monopoly in this market.

1. *Purpose to achieve monopoly and restrain trade*

In determining whether or not to enter Area 2, Phillips was guided by an overriding consideration, repeatedly expressed by its Operating Committee:

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[28]The conduct of Shamrock and its wholly-owned subsidiary pipeline equally reflects the purpose of an integrated oil company to use its pipeline as an instrument to accomplish the objectives of the parent company without regard to the economic requirements of the pipeline subsidiary. See, for example, A. 1045-1047 re: Shamrock's views as to the economic requirements of its Logan extension. This extension was made in the face of the impending construction of the Panotex line, but the economic requirements were never fulfilled (A. 1352). See also *e.g.* A. 454-460: 352, Shamrock extensions to box in Panotex. Shamrock conceded in its brief in the court of appeals that "[p]ositive evidence shows that all decisions regarding the operation of the pipeline company were management decisions of Shamrock (Tr. 780-781, Ap. 420-22)" and that "[t]he only inference to be drawn from the evidence which plaintiffs introduced (Tr. 814-15, 828-29, Ap. 451-52, 465-66) is that Shamrock managed and operated Shamrock Pipe Line." Shamrock's brief, p. 28.

[29]Assumed by the court below to be a relevant submarket (Opn., App., p. 15a).

> Over the long term it will be to Phillips' best interest to control a large percentage of the crude oil supplies serving its refineries. Crude from this area will be a valuable supply for the Borger Refinery. Unless Phillips is able to purchase crude oil from this area on the basis outlined, other purchasers may obtain control of the oil. (A. 1239; see also 1242, 1244.)

Under the proposal which was considered in entering this market, letters of intent were to be "obtained from producers representing a minimum of 5,400 B/D, which is approximately 68% of the 8,000 B/D of production in the area . . ." (A. 1242, 1244, 1247). It is clear that these were minimum goals and that Phillips and its pipeline company hoped to secure the entire production in this area. That Phillips would achieve this result if it were able to enter the market before any other competitor was indicated by the fact, as the court below found, "that a pipeline tends to be a natural monopoly" and furthermore "that the first pipeline into an area customarily gets the connections that are available in the oil fields" (Opn., App., p. 11a).[30]

Because the first oil company to enter a market "customarily" achieves a monopoly, time is necessarily of

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[30] Where a company entering a natural monopoly market engages in "an unfair practice, not honestly industrial" such conduct is "conclusive evidence of the exclusionary intent proving a violation of Section 2." *Union Leader Corp. v. Newspapers of New England*, 284 F.2d 582, 585 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961). See also *United States v. Aluminum Co. of America*, 148 F.2d 416, 429-431 (2d Cir. 1945) and *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 341 (D. Mass. 1953), aff'd 347 U.S. 521 (1954). The agreement between Phillips and its pipeline subsidiary to extend its pipeline on an uneconomic basis (discussed below) was clearly an "unfair practice, not honestly industrial" and thus is "conclusive evidence of the exclusionary intent proving a violation of Section 2" (*Union Leader, supra*, at p. 585).

the essense. As a top official of Phillips testified, the line was sought to be completed "as quickly as possible" (A. 500). A crash program was put into effect immediately after plaintiffs obtained their financing so that the Phillips' pipeline would be in operation within 30 days, in contrast to a waiting period of 60-180 days previously contemplated. The obvious purpose of this acceleration was to get a jump on the plaintiffs, who did not enter until 4 months later, and thus to secure a monopoly and to prevent plaintiffs from entering this market.

2. *The uneconomic basis of the proposed pipeline.*

Phillips Pipe Line Company had conducted study after study in which it had concluded that certain minimum requirements were necessary for the operation of an economic pipeline in Area 2. It had determined that a minimum of 5,400 barrels a day would have to be secured to make the line profitable on a self-sustaining basis.

To achieve its competitive purpose to exclude plaintiffs from the market, Phillips entered into an agreement with PPLC under which the latter agreed to waive the economic requirements which it had established and, as the court below found, "Phillips agreed with its pipeline subsidiary to guarantee it a seven per cent return on investment as a condition of a pipeline extension into Area II" (Opn., App., p. 17a). Thus, in effect, Phillips agreed to subsidize the line as a substitute for the economic requisites which the pipeline company had established.

The court rejected the evidence with respect to the lack of economic feasibility of the pipeline on the ground that there was "no proof, however, that the extension

was unprofitable and thus something from which an inference of predatory conduct could be drawn" (Opn., App., p. 18a). (Emphasis added.) Whether the pipeline in fact turned out to be profitable or unprofitable, however, was not of importance, just as it was not necessary for the parties actually to have achieved their purpose of securing a monopoly. The critical fact in determining whether there was an attempt to monopolize or an unlawful agreement in restraint of trade was the parties' purpose at the time in taking the action which they did.[31] Furthermore, it seems clear that the jury could reasonably have inferred that the pipeline was not economic from the fact that the pipeline company had determined that certain minimum requirements were necessary for an economic line and that these requirements were not met.

3. *Dangerous probability of securing a monopoly.*

Although, as we have demonstrated, the showing of a dangerous probability of achieving a monopoly is not necessary to establish an attempt to monopolize under Section 2 of the Sherman Act, nevertheless, there can be little doubt but that when Phillips' pipeline subsidiary entered the relevant market it was highly probable that a monopoly would be secured, despite the lower court's conclusion that "a dangerous probability of success is clearly lacking" (Opn., App., pp. 18a-19a). Since "a pipeline tends to be a natural monopoly" and "the first pipeline into an area customarily gets the connections that are available in the oil fields" (Opn. App., p. 11a), it

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[31]As noted earlier, the trial judge pointed out when he originally denied Phillips' motion for a directed verdict: "There is testimony in the record of the fact that the economic benefits be hanged, we're just going to get this thing built."

follows inexorably that there is a high probability that the first pipeline to enter a field will achieve a monopoly. This is particularly true when the pipeline in question is a wholly-owned subsidiary of a large integrated oil company, and the competitive pipeline is newly formed and of comparatively minuscule proportions. There is good reason to believe that, had plaintiffs not instituted this lawsuit immediately after the decision by Phillips to enter the market, this purpose would indeed have been achieved.

C. Phillips' Alleged Need for the Oil in the Field Was Not a Proper Justification for Its Unlawful Conduct.

The court below concluded that Phillips acted in accordance with a "proper business motive" (Opn., App., 18a) in causing its subsidiary to extend its pipeline into Area 2. The stated justification which the court found to be proper was the claim by Phillips that it "needed the oil for its refinery" (Opn., App., p. 18a). It seems clear that a small pipeline company such as Panotex can survive competition with an integrated company only if the major oil company maintains its pipeline subsidiary on an independently economic basis. Thus, the justification of any action by a pipeline subsidiary must be related to the economic needs of the subsidiary itself and not to those of the parent company. The fact that the parent company may "need" the oil could cause it to operate the subsidiary on an uneconomic basis which could put the independent out of business or inflict serious financial injury upon it.

The decision by Phillips to cause its pipeline subsidiary to extend its pipeline solely to achieve the purposes of the parent company despite the fact that its pipeline was not self-sustainable, exemplifies the type of abuse which

can result from the control of pipelines by integrated oil companies. A pipeline which is operated to serve the objectives of the integrated oil company which owns it and which is afforded subsidies by its parent company to accomplish those objectives may tend to sacrifice the interests of other producers and refiners and in its operations may, as occurred here, compete in a predatory manner against independent companies. To avoid these potential abuses, a petroleum company must maintain the independence of the pipeline company and permit it to operate in a manner consistent with the latter's independent economic interests.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1335

PANOTEX PIPE LINE COMPANY, ET AL,
Plaintiffs-Appellants,

versus

PHILLIPS PETROLEUM COMPANY and
DIAMOND SHAMROCK CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(February 17, 1972)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

BELL, Circuit Judge: This appeal arises out of antitrust litigation. The district court directed verdicts for the defendants. We affirm.

Cameron and its pipeline subsidiary, Panotex, claimed damages jointly and severally against Phillips

and Shamrock, alleging a conspiracy between them, and also a conspiracy between each of them and their respective subsidiaries, Phillips Pipe Line Company and Shamrock Pipe Line Corporation. The gist of the complaint was a conspiracy, as stated, to restrain and monopolize, and to attempt to monopolize interstate commerce in the purchase and transportation of crude oil in designated areas in violation of §§ 1 and 2 of the Sherman Act. 15 USCA, §§ 1 and 2. The cause of action also alleged individual conduct on the part of Phillips and Shamrock in violation of the same statutes. The prayer was for damages and injunctive relief under §§ 4 and 16 of the Clayton Act. 15 USCA, §§ 15 and 26. The complaint and the evidence introduced in support thereof bottoms out as a claim that defendants attempted to foreclose a competitor, and having failed in that, to thereafter restrict the competitor.

The cause was tried to a jury. Motions for directed verdicts filed by Phillips and Shamrock were denied by the district court at the close of plaintiffs' case. Defendant Phillips then proceeded to put on its defense. Shamrock put in a part of its evidence through cross-examination of witnesses for Phillips. After two days of defense evidence, the court suggested, sua sponte, that Shamrock again move for a directed verdict. Shamrock so moved and the motion was granted. Phillips then asked for the same relief and its motion was granted. Counterclaims against Cameron and Panotex were severed and are not a part of this appeal.

There are three assignments of error. First, plaintiffs urge that it was prejudicial procedural error to

grant motions for directed verdicts in the middle of defendants' cases, i.e., at a random time during the trial. The contention is that a directed verdict may be granted under Rule 50, F.R.Civ.P., only after the opening statement of opposing counsel, at the close of the evidence offered by an opponent, or at the close of all of the evidence, citing 5A Moore's Federal Practice, par. 50.04. Plaintiffs also assign error on a substantive basis in the granting of directed verdicts, urging that the evidence was sufficient to make a jury question. Lastly, error is asserted on the basis of the exclusion of certain items of evidence offered by plaintiffs.

The facts will be detailed in connection with the discussion of the alleged substantive error in directing verdicts for defendants. We proceed first to a discussion of the claimed procedural error.

I.

The motions for directed verdict were granted during the presentation of the defense testimony. There was extensive colloquy between the court and counsel. The posture of the case at the time was somewhat complex in that the counterclaims of each defendant based on alleged antitrust violations by plaintiffs were being tried to the same jury. Plaintiffs' proof was voluminous and the court indicated that it had reviewed all of the testimony to date and was inclined to reconsider the motion of Shamrock for a directed verdict, and also to sever Shamrock's counterclaim. (This was the previously overruled motion for directed verdict.)

The court then ruled as indicated for Shamrock. At that point, plaintiffs joined with Phillips in moving f a mistrial because of the hiatus and confusion left in the proof as to liability and damages due to the removal of Shamrock. Phillips had moved for a directed verdict following the grant of Shamrock's motion but this motion was overruled. Following the joint motion for mistrial, the court reconsidered and granted Phillips' motion for directed verdict and also severed its counterclaim.

At no time during the proceeding did plaintiffs fer any objection whatever to the timing of the directed verdicts. Moreover, nothing was said during the proceeding which pointed to any prejudice to plaintiffs from the standpoint of timing.

There was a hearing on the form of the final judgment about a month later. At this hearing, plaintiffs took the position for the first time that they were prejudiced by the timing of the grant of the motions in that they had previously reserved the right to redirect examination of certain witnesses. The record does not reflect this reservation. The court, in fact, required plaintiffs to complete their case prior to closing.

At the same hearing, plaintiffs urged the court to make it clear in the final judgment that the motions for directed verdicts were granted on the state of the record at the time the motions were granted. The court and all counsel agreed that this was the case and the judgment so provides. Having this in mind, plaintiffs take a different position here with respect to prejudice.

They no longer urge the reservation of the right to redirect examination of the witnesses. They now contend that the court granted them the right to rebut evidence put in by Phillips in two instances. This evidence, produced from the files of Shell Oil Company, consisted of commitments to Cameron from oil producers to sell crude oil for transportation by Panotex. The pipeline of Panotex connected with that of Shell and all Cameron sales were to Shell. The other evidence was the record of oil deliveries from Cameron to Shell via Panotex. We are unable to perceive the need to rebut this evidence. We are not told how it could be rebutted, nor how it was in anyway prejudicial. We find no prejudice to plaintiffs in these events.

We do not reach the question whether Rule 50, F.R. Civ. P.,[1] prohibits the granting of a motion for directed

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[1]Rule 50:

"(a) Motion for Directed Verdict: When Made: Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

"(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. . . ."

verdict during the presentation of a defendant's case. The rule contains no such restriction nor have we found any authority supporting such a restriction. Indeed, we have found no case in point one way or the other. The Supreme Court long ago pointed to the salutary purpose of a motion for directed verdict. In *Merchants' National Bank of Boston v. The State National Bank of Boston*, 1871, 77 U.S. 604, 19 L.Ed. 1008, it was said with reference thereto:

> "According to the settled practice in the courts of the United States, it was proper to give the instruction if it were clear the plaintiff could not recover. It would have been idle to proceed further when such must be the inevitable result. The practice is a wise one. It saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and the jury, and fixes where it belongs the responsibility which should be assumed by the court." 77 U.S. at 637

In the end, the question of directing a verdict for a defendant during the defendant's presentation is one of orderly procedure in the frame of reference of trial court discretion, procedural due process, and a fair trial. Here there is nothing of record to support any denigration of procedural due process or the essence of a fair trial. Thus we find no error as claimed.

From the view that plaintiffs must show prejudice, the situation is analogous to federal criminal procedure where the court commits error by reserving a ruling on a defendant's motion to acquit. The error is harmless absent a showing that the evidence was insufficient to sustain a conviction when the government rested its case. *Cooper v. United States,* 5 Cir., 1963, 321 F.2d 274, 277; *Montoya v. United States,* 5 Cir., 1968, 402 F.2d 847, 849-50; *United States v. Day,* 5 Cir., 1971, 438 F.2d 121, 122.

As Justice Field stated for the court in *Oscanyan v. Winchester Repeating Arms Company,* 1881, 103 U.S. 261, 26 L.Ed. 539, in a case where a verdict was directed following the opening statement of counsel:

> "... if in the progress of a trial, either by such admission [of counsel] or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion or that of counsel, act upon it and close the case." 103 U.S. at 263

II.

Before considering the merits of the action of the district court in granting the motions for directed verdict, it will be necessary to resolve the question presented with respect to the exclusion of certain evidence offered by plaintiffs. This question involves three separate items.

The first item is an inter-corporate letter from one Phillips employee to another, dated November 11, 1960, setting out the general situation in the industry as to oil reserves in the general geographical area pertinent to this suit. The letter mentions the prospect of raiding Shamrock's customers to increase Phillips' crude oil supply. The crude oil reserves and acquisition prospects of many oil companies in the area are also discussed. The position of plaintiffs is that this letter was admissible to show motive for later concerted action between Phillips and Shamrock. The district court excluded it on the ground that it originated prior to the period of activities giving rise to the suit.

We hold that this letter was admissible, and was to be given such weight as it might deserve in light of the proof, if any, as to any future concerted action between Phillips and Shamrock. Cf. *Federal Trade Commission v. Cement Institute*, 1948, 333 U.S. 683, 705, 68 S.Ct. 793, 92 L.Ed. 1010. Accordingly, it will be considered here in determining whether verdicts should have been directed.

The next item was a contract showing that Shamrock purchased casinghead gas from oil producers. Plaintiffs, not having a refinery, purchased only crude oil and condensate. The argument is that Shamrock used casinghead gas purchases as a lever to obtain contracts for the purchase of crude oil and condensate; hence, an illegal tying arrangement. The district court excluded this evidence on the ground that it was irrelevant to the pleadings.

Ordinarily this evidence would have been admissible to show the vehicle for an illegal tying arrangement as a part of an attempt to monopolize or restrain trade on the part of Shamrock. The admission would be subject, however, to the introduction of some evidence of a tying arrangment. There was no proffer of evidence to show such a tying arrangement at the time this evidence was excluded nor at any other time. Thus the error was in the abstract and harmless.

The third item of evidence is a group of letters and memoranda having to do with the effort of Cameron to obtain a loan from the First National City Bank of Houston, Texas, with which to finance their proposed pipeline. The fact of attempting to obtain this loan was stipulated. There was also full testimony regarding the effort. Plaintiffs wished to put in such portions of the letters and memoranda as would reflect Phillips' alleged antagonism to the proposed pipeline and as would provide a basis for an inference that the loan was not made because of Phillips' influence over the bank. The district court excluded this evidence on grounds that the documents contained hearsay, as well as self serving opinions and conclusions on the part of a Cameron agent. With these objectionable portions removed from the documents, the court was of the opinion that nothing of coherent value would remain to be considered by the jury.

This evidence consisted of twelve letters and three memoranda prepared by Cameron's agent and one letter from an officer of the Houston bank regarding Cameron's application for the loan. The court properly

refused to admit the conclusions and opinions of Cameron's agent which were contained in the letters and memoranda. They were not admissible under the Business Records Act, 28 USCA, § 1732(a); *Standard Oil Company of California v. Moore*, 9 Cir., 1957, 251 F.2d 188, 213-14. No effort was made by plaintiffs to introduce the documents with the conclusions and opinions deleted and thus we need not consider whether the remaining documents or parts thereof qualified as an exception to the hearsay rule under the Business Records Act. The court did not err in excluding this evidence.

There is one other item of excluded evidence concerning which plaintiffs assign error but it goes to the question of damages. As will be seen, we do not reach the question of damages and thus it is unnecessary to consider this assignment of error.

III.

We now turn to question whether the court erred in directing verdicts for defendants or either of them. The test to be applied is the now familiar one of *Boeing Company v. Shipman*, 5 Cir., 1969, 411 F.2d 365 (en banc), where we said:

> "On motions for directed verdict ... the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and infer-

ences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury." 411 F.2d at 374.

Phillips and Shamrock were integrated oil companies in that they owned and operated refineries in the geographical area with which we are concerned. They transported their own production as well as the production of others to their refineries. The transportation was by their subsidiary pipeline companies. Cameron had no production but purchased from others for transportation over Panotex, its subsidiary, to Shell's pipeline.

It is a fact also that a pipeline tends to be a natural monopoly. Plaintiffs offered testimony to the effect that the first pipeline into an area customarily gets the connections that are available in the oil fields. If two lines enter at about the same time, they are likely to divide the available production. In addition, a trucking operation is not competitive with a pipeline.

As the Supreme Court has noted, *Federal Trade Commission v. Cement Institute*, supra; *Standard Oil Co. v. United States*, 1911, 221 U.S. 1, 46, 31 S.Ct. 502,

55 L.Ed. 619, evidence as to events prior to and following alleged antitrust activity is admissible if it tends to show the purpose and character of particular transactions under investigation. Thus it is that the charges against defendants must be viewed in the background of the facts as they existed prior to entry of Cameron and Panotex into the pipeline market; indeed prior to the creation and construction of Panotex.

Background and Relevant Markets

The controversy involves competition between three pipelines, Phillips, Shamrock and Panotex, in the general area of the Texas-Oklahoma border. Oil situated in two counties in Oklahoma is involved: Beaver and Texas Counties. These counties border on the north boundary of the State of Texas. Oil situated in ten Texas counties lying immediately south of these Oklahoma counties is also involved. The counties are Hansford, Ochiltree, Lipscomb, Moore, Hutchinson, Roberts, Hemphill, Carson, Gray and Wheeler.[2]

Phillips' refinery is in Hutchinson County. Shamrock's refinery is in Moore County. As of 1954, the crude oil for these refineries was supplied out of the Texas panhandle oil field, in Moore, Hutchinson, Roberts, Carson, Gray and Wheeler Counties. The reserves in this field were becoming inadequate to meet the needs of the refineries. New fields were being developed in the counties to the north and east. By 1957, Shamrock

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[2]See Appendix A attached for a map of the general area and the pipelines pertinent to this litigation.

had extended its pipeline north into fields located in Hansford and Ochiltree Counties. Phillips remained in the panhandle.[3]

By 1961, Phillips had extended its pipeline through the southeast corner of Hansford County to connect one field, and on through Ochiltree County to connect with several fields and into Texas and Beaver Counties in Oklahoma (the Camrick area) to connect with fields there. Its pipeline crossed that of Shamrock in Ochiltree County.

In 1961, Cameron was engaged in purchasing crude oil in the Camrick area of Texas and Beaver Counties and transporting it by truck for resale. The Phillips pipeline extension into the Camrick area brought about a considerable reduction in Cameron's trucking business but that reduction is not a basis of the claim here.

In 1963, Mobil Oil, a company not involved in the controversy here, extended its pipeline into the Camrick area from the north.

The area to the east of these lines, in Texas and Oklahoma was undeveloped. Thereafter, beginning in 1963, fields were developed in this eastern area, in Beaver County, Oklahoma, and in Lipscomb County and in the north part of Hemphill County, in Texas.

By August 1963, Shamrock had extended its pipeline eastward into this new area in Lipscomb County to

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[3]By 1968, Shamrock had extended its line to southern Colorado to obtain oil for its refinery.

connect with the Frass and W. Follett fields. This was pre-Panotex.

During this year of 1963 the Panotex pipeline was conceived by Cameron and commitments from producers were being obtained. Primary equity financing was obtained in late 1963 from Alliance Business Investment Company. In February 1964 a loan was sought from the Houston bank. This effort was unsuccessful and financing was sought and obtained in New York in July 1964. Panotex came into corporate existence in July 1964, its line was commenced in October 1964 and became operative in January 1965.

Meanwhile, as Cameron's president discovered in 1963, Phillips was soliciting commitments from purchasers in 1962 in the Oklahoma part of the Texas-Oklahoma area where Cameron began solicitations in 1963. These solicitations were for production as far east as the Logan area in Beaver County, Oklahoma. Phillips had considerable production of its own in the Como area and was trucking six to seven thousand barrels of oil per day from there to Camrick. This oil amounted to approximately ten per cent of the capacity of Phillips' refinery.

Cameron testified that he began looking at this area after his Camrick trucking operation declined in 1961. His idea was that new pools of oil would be developed in this eastward territory in Beaver and Lipscomb Counties and this proved to be the case in the next few years.

This brings us to the relevant markets. Plaintiffs tried the case on the theory of three relevant markets. We will consider the case on that basis and without determining the correctness of the delineation.

Area I, according to plaintiffs' theory of suit, is the Camrick area, heretofore described. It was served by Phillips' pipeline beginning in 1961 and by Mobil beginning in 1963. Panotex has never entered this market.

Area II is south Beaver County and mainly the Balko, Elmwood and Como fields in that county. Phillips extended its pipeline east through the Balko and Elmwood fields and to Como in September 1964. Panotex constructed its line westward through these fields in January 1965. Prior to these extensions, Cameron and Phillips were advised of what the other proposed to do.

Shamrock served neither Area I or II by pipeline. Phillips does not serve Area III. Area III consists of the Logan field in Beaver County, Oklahoma and all of Lipscomb County, and the Feldman field in Hemphill County, Texas. It is served by Shamrock and Panotex. The Panotex line began at the Shell pipeline at Elk City in Beckham County, Oklahoma, considerably southeast of the areas in question, and thence extended in a northwesterly direction into fields in Lipscomb and Hemphill Counties, Texas, namely the Feldman, West Higgins, Kelln and Mathers field. It is to be noted that Panotex had a monopoly in these fields until 1968 when Shamrock entered Kelln and West Higgins. The Cranford, Bishop and West Durham fields had

been developed along the line of Panotex by 1968 and were served exclusively by Panotex.

The line of Panotex continued northwesterly to reach the Lipscomb and Bechthold fields in Lipscomb County, Texas, and the Loan [sic Logan] field in Beaver County, Oklahoma. It appears that Shamrock reached the Lipscomb field in August 1963 and extended to the Logan and Bechthold fields in August 1964. Shamrock, prior to its extension and the entry of Panotex, had been purchasing oil from the Logan area from a trucker who served the area.

The Case Against Phillips and its Subsidiary

The issue presented is the foreclosing or restriction of a competitor, Cameron-Panotex. The claim is premised on conduct of Phillips, acting alone or in league with its pipeline subsidiary or with Shamrock.

We begin by eliminating Area I. Panotex is not in Area I. Phillips has been there since 1961. Cameron-Panotex makes no case whatever from a factual standpoint on being foreclosed from or restrained in Area I, either through an attempted monopoly or by way of a restraint. The facts at best show only that Area I had no pipeline service until 1961 when Phillips entered. There is no evidence that Cameron-Panotex ever considered entering Area I after the entry of Phillips. The evidence demonstrates no more than a normal business venture on the part of Phillips in entering Area I (Camrick). The issue narrows to Areas II and III.

Area II consists of only three fields, Balko, Elmwood and Como. They are served by Phillips and Cameron-Panotex. Phillips extended east from Area I in September 1964 and Panotex commenced service in January 1965. Phillips had solicited commitments in Area II in 1962 according to Cameron. It was trucking oil out of the area and had production of its own on 16,000 acres of leases in the Como area. Phillips also solicited in the Logan field in Area III. Cameron began solicitations in the area in 1963. There was no previous pipeline service to Area II. Phillips had little success in obtaining commitments.

The evidence disclosed that plaintiffs were purchasing 100 per cent of the Balko production, most of the Elmwood production, fifty per cent of the Como production (Phillips had some production), and all of the Logan production except for one producer. This was the situation immediately upon the completion of the Panotex line and plaintiffs obtained all of the oil that was committed to them. In the ensuing years, Panotex has obtained all new production in Area II and at Logan. Phillips has not connected to a new lease since 1964.

When Cameron announced in 1964 that it had received financing, Phillips met Cameron's price and contract terms. Its prior offers had been higher and its contract terms more stringent. In addition, Phillips agreed with its pipeline subsidiary to guarantee it a seven per cent return on investment as a condition of a pipeline extension into Area II. The commitments of Phillips, according to plaintiffs, were insufficient

to produce such a return. It does appear that the commitments were less than the number theretofore insisted upon by the Phillips pipeline subsidiary. There is no proof, however, that the extension was unprofitable and thus something from which an inference of predatory conduct could be drawn. In meeting the Panotex competition, Phillips took three simultaneous steps: (1) it met Cameron's price offer; (2) it met Cameron's contract requirements as to period of contract; (3) it guaranteed its pipeline subsidiary a seven per cent return so as to replace its trucking operation with a pipeline. The proof stops here. It goes no further than to show that Phillips needed the oil for its refinery and would be preempted by the entry and consequent monopoly of another pipeline. It is true that the evidence shows that Phillips considered Area II as "its own backyard" and sought to protect its position in the area. This, however, amounts to nothing more than a proper business motive under the circumstances. Cf. *Times-Picayune Publishing Company v. United States*, 1953, 345 U.S. 594, 627, 73 S.Ct. 872, 97 L.Ed. 1277, on the necessity to prove something more than a "step predominantly motivated by legitimate business aims ..." to show an intent to monopolize.

At this point we find that the evidence of a conspiracy between Phillips and its pipeline subsidiary is nonexistent from the point of showing a violation of §§ 1 or 2 of the Sherman Act.

This is likewise true as to showing an attempt to monopolize on the part of Phillips. Assuming *arguendo*, intent and a relevant market, a dangerous probability

of success is clearly lacking. See *Cliff Food Stores, Inc. v. Kroger, Inc.*, 5 Cir., 1969, 417 F.2d 203, 206-08.

The action of Phillips in extending into Area II did not rise above a protective motive. Phillips was already present through a trucking operation and through its own production. Panotex was transporting in another direction and away from Phillips' refinery. Protection of its refinery by the assurance of some of the oil reserves in Area II was no more than a normal business practice absent conduct calculated to bar the entry of a competitor into Area II or to drive a competitor out of the area. The proof disclosed no such conduct on the part of Phillips. There was no proof of predatory conduct or of conduct which was illegal per se. It follows that the proof was insufficient to make a jury question as to a restraint of trade by Phillips from the conduct disclosed to this point.

Plaintiffs urge that Phillips violated the Sherman Act by allegedly blocking Cameron's application for a loan from the Houston bank with which to construct Panotex. The Chairman of Phillips happened to be a director of the bank. Phillips had been a long time large depositor in the bank. The other side of the coin is that the loan was never formally rejected although some five months of negotiations took place. The bank was troubled by the probability of success of the venture, considering competitive pipelines in the proposed Panotex area and the status of Cameron's commitments. There is no evidence that Phillips influenced by word or deed the decision not to make the loan. There the matter ends. A Phillips officer on the bank

board and a Phillips deposit in the bank will not suffice as a base for an inference of loan influence and in turn, for an inference of an antitrust violation. The bank sent a consultant to discuss the prospects of Panotex with Phillips and Phillips advised that it intended to compete for the oil. This was a business judgment in line with the needs of its refinery. Phillips was not willing to give up the area where it competed to Panotex.

There is one other charge against Phillips and it stems from an alleged division of markets as between Shamrock and Phillips. This will be considered following the discussion of the case against Shamrock.

The Case Against Shamrock and Its Subsidiary

There is no evidence that Shamrock conspired with its pipeline to restrain trade or to monopolize. The competing lines were simply built either prior to the entry of Panotex or after the entry of Panotex. The subsidiary pipeline did no more than build lines, set prices and make purchases. Shamrock's prices were uniform throughout the Shamrock system except in one instance. This one instance occurred for a short time in the Logan and Bechthold fields. Shamrock first attempted to pay producers a price less than that paid by Cameron. When Cameron obtained commitments from eighty per cent of the producers, Shamrock raised its net offer to the producers. After this price increase, Shamrock's price, while exceeding that of Cameron by two cents per barrel, was uniform with its prices throughout the remainder of its system.

Moreover, Cameron had contracts with its producers to hold them providing it met the prices of others.

The competition between Panotex and Shamrock was all in Area III. By and large, as stated, Shamrock was in this area prior to the entry of Panotex and, like Phillips, was seeking oil for its refinery. There is no evidence that the conduct of Shamrock or its subsidiary exceeded a protective position. It competed with Panotex for oil but without predatory action. It engaged in no conduct which can be described as illegal per se under the Sherman Act. The proof is clear that there was no dangerous probability of a monopoly.

We conclude that the evidence was insufficient to make jury issues on the charges against Shamrock to this point.

The Alleged Phillips-Shamrock Conspiracy

The proof was that Phillips and Shamrock had been competing in the general area involved for more than 40 years. There was evidence as to specific examples of competition between them. Plaintiffs' case, however, comes down to evidence of a telephone conversation between Phillips and Shamrock, made to Phillips by Shamrock in 1964, wherein Shamrock inquired whether Phillips had any interest in extending into the Logan area. Phillips answered that it did. Shamrock replied that it too would also have to go into Logan and that "it won't be the first time we have been competitors."

Plaintiffs make much of the fact that Shamrock extended to Logan and Phillips did not. Phillips went no further east than the Como field in Area II while Shamrock went no further west than Logan. Standing alone, this might give rise to an inference of a division of markets between Phillips and Shamrock to the detriment of their mutual competitor, Panotex. But this evidence does not stand alone.

Phillips had been seeking commitments in the Logan area without success. Panotex had every producer in the field except one. Shamrock acquired that one. The interest of Phillips was such that it staked a right of way into Logan but abandoned the prospect for lack of business.

Phillips had production of its own in the Como field and some additional suppliers. These facts gave good reason for Phillips to stop at Como and for Shamrock to stop at Logan. They established a basis for a business judgment resting on the idea that a certain amount of production was necessary to warrant the expense of extending the pipelines. Any inference of a division of markets must give way to these facts.

This case began in 1964. It has been strenuously developed through discovery and otherwise. It occupied more than two weeks of trial time. In the end there is no substance to plaintiffs' claims. Under the test of viewing the evidence in the light most favorable to plaintiffs and giving them the benefit of all inferences which might reasonably be drawn from estab-

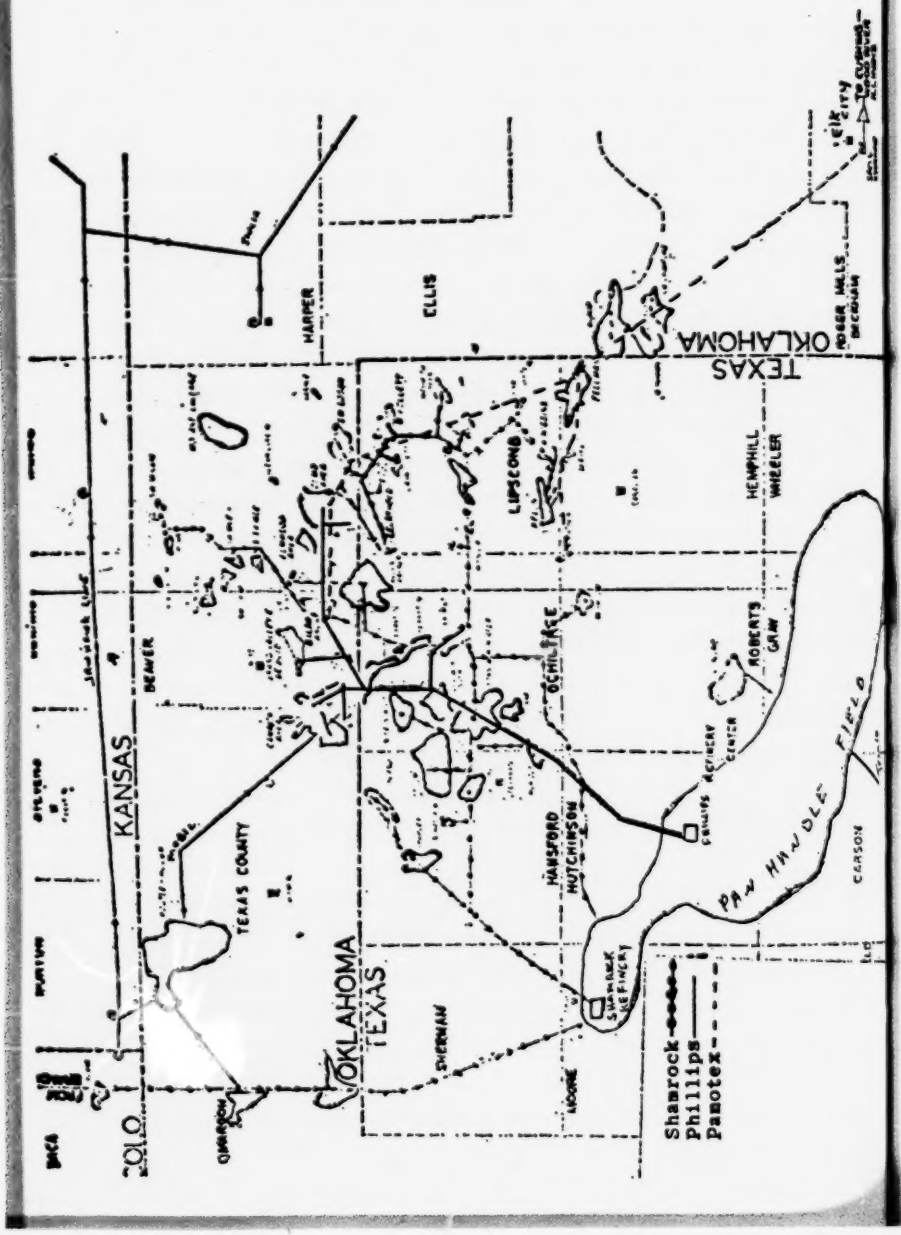
lished facts, we have nothing more than competition between the parties.

It seems implicit in plaintiffs' position that they view the law as protecting them from competition, whether from those already in the market or from newcomers to the market. This is not the law, and the fact that a pipeline can be a natural monopoly does not mean that it is protected from competition. The Sherman Act fosters competition by protecting it from illegal restraints and monopoly power. *Northern Pacific Railway Company v. United States*, 1958, 356 U.S. 1, 4-5, 78 S.Ct. 514, 2 L.Ed. 2d 545. Plaintiffs, of course, are protected to this extent. However, after having considered all of the evidence and every contention made by plaintiffs, we find no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of defendants, individually or collectively. The record is one of allowable competition — nothing more.

We hold that the district court did not err in directing verdicts for Phillips and Shamrock.

AFFIRMED.

PANOTEX v. PHILLIPS PETROLEUM CO.
APPENDIX "A"



1. CONSTITUTION OF THE UNITED STATES: Amendment 7:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATUTES

Section 1 of the Sherman Act, 15 U.S.C. § 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair

method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

Section 2 of the Sherman Act, 15 U.S.C. § 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

Section 4 of the Clayton Act, 15 U.S.C. § 15.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

Section 16 of the Clayton Act, 15 U.S.C. § 26.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, §16, 38 Stat. 737.

Federal Rules of Civil Procedure, Rule 50

Rule 50. Motion for a Directed Verdict

(a) *Motion for Directed Verdict: When Made; Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) *Motion for Judgment Notwithstanding the Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) *Same: Conditional Rulings on Grant of Motion.* (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) *Same: Denial of Motion.* If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

As amended Jan. 21, 1963, eff. July 1, 1963.

EXHIBIT "A"

[PLAINTIFF'S EXHIBIT 118]